STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY DUANE TAYLOR,

Defendant-Appellant.

UNPUBLISHED
June 1, 1999

No. 190480
Jackson Circuit Court
LC No. 94-071013 FC

Before: Griffin, P.J., and McDonald and White, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for armed robbery, MCL 750.529; MSA 28.797, conspiracy to commit armed robbery, MCL 750.157a; MSA 28.354(1), possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and carrying a concealed weapon in a motor vehicle (CCW), MCL 757.227; MSA 28.424. Defendant was sentenced as a second-felony habitual offender, MCL 769.10; MSA 28.1082, to concurrent terms of 12 to 25 years each for the conspiracy and armed robbery convictions, and 3 to 7-1/2 years for the CCW conviction, to be served consecutive to a two-year term for the felony-firearm conviction. We affirm, but remand for correction of the judgment of sentence regarding the CCW sentence.

Defendant first argues the trial court clearly erred in its rulings following the suppression hearing. We address each of defendant's claims separately.

First, defendant claims the police were required to have probable cause to stop his vehicle. We disagree. The trial court did not err in finding that the initial stop of the vehicle was an investigatory stop, even though the occupants of the vehicle, defendant and his three codefendants, were not free to leave. *Terry v Ohio,* 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968). Even though the initial stop was a "seizure," *People v Shankle,* 227 Mich App 690, 693; 577 NW2d 471 (1998), it did not escalate into a formal arrest, requiring full probable cause, *People v Bloyd,* 416 Mich 538, 553; 331 NW2d 447 (1982), until the police found bank money on one of the codefendants. Certain circumstances, such as an officer's justifiable fear for personal safety or the safety of others, may justify more intrusive means of effectuating an investigatory stop without converting the stop to an arrest. *US v Hardnett*, 804 F 2d 353, 356-357 (CA 6, 1986); *People v Zuccarini*, 172 Mich App 11, 14; 431 NW2d 446 (1988).

Next, defendant claims that his behavior, that of very carefully driving the car carrying all four codefendants, did not give rise to a reasonable, articulable suspicion to justify the investigative stop. *Terry, supra.* Defendant focuses only on his apparently innocent behavior driving the vehicle. The absence of innocent behavior has never been a requirement for the suspicion required to make an investigatory stop. *People v Nelson*, 443 Mich 626, 632; 505 NW2d 266 (1993). Defendant's argument fails to appreciate the totality of the circumstances, including Deputy Elder's observations in light of his training, eighteen years of experience, and the information known to him when he radioed for assistance and initiated the stop of defendant's vehicle. *People v Yeoman*, 218 Mich App 406, 410; 554 NW2d 577 (1996). The trial court properly concluded that the stop was supported by a reasonable, articulable suspicion. *People v Bordeau*, 206 Mich App 89, 93; 520 NW2d 374 (1994), reversed on other grounds *People v Gatewood*, 450 Mich 1025; 546 NW2d 252 (1996).[1]

Defendant further claims that finding contraband in the vehicle does not validate an invalid stop and arrest, which were without an articulable suspicion or probable cause. We again disagree. We have already determined that the stop was valid, and we find that there was probable cause for the subsequent arrests based on the bank money found on one of the codefendants. *Bloyd, supra.* The probable cause for arrest also constituted probable cause that contraband could be found in the vehicle, which justified the search of the vehicle without a warrant under the automobile exception. *People v Clark*, 220 Mich App 240, 242; 559 NW2d 78 (1996). The authority to search the entire vehicle defeats defendant's claim that his consent to search the vehicle was coerced. His consent was not needed. *Id.* In any event, there was evidence that defendant consented to the search of the trunk at the scene of the arrest.

Defendant next claims that, even if his arrest was valid, there are independent reasons to suppress each of the four statements that he made subsequent to his arrest. We limit our review to the first and fourth statements, since only those were used at trial, the first for impeachment purposes and the fourth in plaintiff's case-in-chief.

Defendant claims his first statement was involuntary. We disagree. The evidence showed that defendant told Detective Crawford that he had three years of college and only three hours of sleep, but that he was on no medications or alcohol. Defendant was thirty-one years of age at the time of the arrest, he waived his *Miranda*[2] rights, he was a second-felony offender indicating prior experience with the criminal justice system, and he does not allege coercive police activity. We conclude, on review of the entire record, that there is no support for defendant's claim that this statement was not voluntarily given. *People v Howard*, 226 Mich App 528, 542; 575 NW2d 16 (1997).

We do agree with defendant that the trial court erroneously admitted his fourth statement, which defendant gave to Detective Roberts just prior to the scheduled resumption of the preliminary examination after defense counsel arranged a plea bargain with the prosecutor. When making this statement, defendant clearly had a reasonable, subjective expectation of a plea, and the prosecutor stated that the plea agreement "depended on what [defendant's] statement was going to be." *People v Dunn*, 446 Mich 409, 415-416; 521 NW2d 255 (1994); *People v Hannold*, 217 Mich App 382, 391; 551 NW2d 710 (1996); MRE 410. However, we find this error was harmless in light of

codefendant Warnsley's testimony and all the corroborating evidence at trial. See *Dunn, supra* at 417-418.

Defendant next claims that his twelve to twenty-five year sentences for conspiracy and armed robbery are disproportionate because he is "only 32," has been involved with the community and is in need of rehabilitation. We are not persuaded by defendant's argument. Defendant is a second-felony offender and an admitted drug dealer, was "considerably older" than his codefendants, and was seriously lacking in remorse. We find the sentence is proportionate to the offense and the offender and that the trial court did not abuse its discretion in sentencing defendant. *People v Milbourn,* 435 Mich 630; 461 NW2d 1 (1990); *People v Gatewood (On Remand),* 216 Mich App 559, 560; 550 NW2d 265 (1996). However, remand is required to correct defendant's sentence for CCW, which is to run concurrently with, rather than consecutive to, defendant's felony-firearm sentence. *People v McCrady,* 213 Mich App 474, 486; 540 NW2d 718 (1995).

Defendant next claims the district court erred in binding him over on the conspiracy and armed robbery charges because the evidence at the second part of the preliminary examination consisted only of the testimony of two officers whose knowledge was limited to events which occurred after the robbery. This claim has no merit, not only because the reviewing court "must consider the entire record of the preliminary examination," *People v Orzame,* 224 Mich App 551, 557; 510 NW2d 118 (1997), but also because sufficient evidence at trial renders harmless any error in the bindover. *People v Dunham,* 220 Mich App 268, 276-277; 559 NW2d 360 (1996).

Finally, defendant claims he was denied the effective assistance of counsel for various reasons, none of which have merit. His untimely motion for a *Ginther*[3] hearing was accompanied by neither an affidavit nor an offer of proof regarding the facts to be established at the hearing. MCR 7.211(C)(1)(a)(ii). Hence, this Court's review is limited to the record, *People v Nantelle,* 215 Mich App 77, 87; 544 NW2d 667 (1996), to determine if defendant has shown that, but for counsel's alleged error, there is a reasonable probability that the result of the proceeding would have been different and that the result of the proceeding was fundamentally unfair or unreliable. *People v Poole,* 218 Mich App 702, 718; 555 NW2d 485 (1996).

Defendant's claim that his first appointed counsel, Mr. Brandt, asked no questions at the first portion of the preliminary examination on December 14, 1994, is negated by the record, which shows that Mr. Brandt cross-examined each of the witnesses presented at that hearing, as did counsel for the other codefendants. Similarly, defendant's claim that Mr. Brandt worked with the prosecutor to induce defendant to make a "more believable" incriminating statement is a reflection of defendant's lack of candor rather than any error on the part of counsel. Defendant's claim that Mr. Brandt was "inadequate" for allowing him to sign the plea agreement is belied by the generosity of the plea agreement. Finally, defendant's claim that Mr. Brandt failed to file motions to suppress and to dismiss is perilously close to being a forbidden attempt to harbor error as an appellate parachute. *People v Shuler,* 188 Mich App 548, 552; 470 NW2d 492 (1991). It was defendant's repeated failure to appear and his lack of candor to the court that caused Mr. Brandt to successfully move to withdraw as counsel. In any event, those motions were subsequently filed by defendant's successor counsel, thereby rendering the issue moot. *People v Greenberg,* 176 Mich App 296, 303; 439 NW2d 336 (1989).

Defendant's convictions and sentences are affirmed, and the case is remanded for correction of the judgment of sentence to reflect that the CCW sentence is to run concurrently with the sentence for felony-firearm. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Gary R. McDonald
/s/ Helene N. White

[1] We note that our conclusion that the stop was supported by reasonable suspicion is consistent with another panel of this Court that considered the issue when it was raised by codefendant Banks in his appeal. *People v Banks*, unpublished opinion per curiam of the Court of Appeals, issued March 7, 1997 (Docket No. 185855), lv den 456 Mich 925 (1998).

[2] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d (1966).

[3] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973)